Grane Trucking Company *and* Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 13-CA-20319

April 27, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On November 3, 1981, Administrative Law Judge Mary Ellen R. Benard issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order.[2]

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, INc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

In its exceptions, the Respondent contends that the Administrative Law Judge mischaracterized Frank Bisceglie's testimony by stating that Bisceglie used the term "reprisals" instead of "repercussions" when describing other drivers' reactions to Clark's use of tractor-trailer rigs on the Rockford run. We agree that Bisceglie used the term "repercussions," and herein correct the Administrative Law Judge's inadvertent error. However, this inadvertent error is nonprejudicial and does not affect the conclusions reached herein.

In the absence of exceptions, Member Hunter finds it unnecessary to pass on the issues raised by the Administrative Law Judge's reliance on *General American Transportation Corporation*, 228 NLRB 808 (1977), to deny the Respondent's motion to refer this case to arbitration.

Although the Administrative Law Judge declined to state specifically that the Respondent's asserted reasons for changing Clark's working conditions were pretextual, the Administrative Law Judge rejected as specious each of the Respondent's asserted economic justifications and stated that the Respondent failed to adduce probative evidence that a change of equipment was needed. Thus, Clark's protected concerted activity clearly dictated the change. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Member Jenkins concludes that where the asserted reasons for the change of an employee's working conditions are discredited and found to be false and unmeritorious, as is the case here, there remains only the unlawful motive as the cause of the change of working conditions, and no separate evaluation of dual or mixed lawful and unlawful motives is called for. Consequently, he does not adopt the Administrative Law Judge's reference to *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), because that decision is directed at separating and evaluating dual or mixed motives, lawful and unlawful, which are genuine or real, which a pretextual or false motive by definition cannot be.

[2] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Grane Trucking Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

MARY ELLEN R. BENARD, Administrative Law Judge: The charge herein was filed on September 3, 1980,[1] by Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union or Local 705, against Grane Trucking Company, herein called Respondent. On November 10 the complaint was issued alleging, in essence, that Respondent threatened to change the working conditions of an employee because of his union and protected concerted activities, and that on or about August 26 Respondent changed the working conditions of employee Melvin Clark and thereby caused him to lose overtime pay because of his union or other protected concerted activities. Respondent filed an answer in which it denied the commission of any unfair labor practices.

A hearing was held before me in Chicago, Illinois, on June 1, 2, and 3, 1981.[2] Following the hearing, all parties filed briefs, which have been considered.

Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is an Illinois corporation with a place of business in Chicago, Illinois, where it is engaged in the transportation of freight. During the calendar or fiscal year preceding the issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, received gross revenues in excess of $50,000 for transporting goods and materials in interstate commerce or from functioning as an essential link in the transportation of goods and materials in interstate commerce. The answer admits, and I find, that Re-

[1] All dates herein are in 1980 unless otherwise indicated.

[2] At the hearing Respondent filed a "Motion To Refer to Arbitration" alleging that its primary defense involved issues which arise under a collective-bargaining agreement between it and the Union, and that therefore deferral to an arbitration proceeding as provided by that contract is appropriate, citing *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971). However, in *General American Transportation Corporation*, 228 NLRB 808 (1977), the Board expressly held that the policy enunciated in *Collyer, supra*, does not apply to cases involving alleged violations of Sec. 8(a)(1) or (3) of the Act, the sections at issue in this proceeding. Accordingly, I denied the motion.

spondent is an employer engaged in commerce within the meaning of the Act, and I find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a trucking firm engaged in the hauling of general commodities, and has been party to collective-bargaining agreements, covering, *inter alia*, Respondent's truckdrivers, with the Union for a period of time which is not specified in the record but appears to be at least several years. The current collective-bargaining agreement is effective from April 1, 1979, to March 31, 1982.

It appears that there is some connection, the nature of which is not clear from the record and about which I make no findings, between Respondent and two other firms, Grane Transportation Lines, Ltd., and Skilled Services Corporation, whose employees are not represented by the Union.[3] The Union had apparently taken the position that all three entities were in essence the same company and picketed Respondent's facility on August 14 in support of that claim. A hearing on this dispute was held before an eight-member joint board comprised of four union and four employer representatives[4] on August 21 and 25.

The current contract between Respondent and the Union specifically provides that "Employee seniority, and not the equipment, shall prevail for all purposes and in all instances."[5] However, there is uncontradicted and credible testimony from both the General Counsel's and Respondent's witnesses that Respondent not only maintained a seniority list of all drivers, but also listed the drivers by seniority based on the types of equipment they drove. This latter list was broken down into three categories: Straight truck, single-axle tractor-trailer, and tandem tractor-trailer.[6] Straight trucks do not have detachable trailers, while single-axle tractors and tandem tractors may be detached from the trailers they pull. Straight trucks can haul a maximum of about 15,000 pounds, while single-axle tractors can haul over 30,000 pounds and tandem tractors can haul up to 76,000 pounds.

Melvin Clark, the alleged discriminatee herein, has been employed by Respondent as a truckdriver since July 7, 1966, and as of August 1980 was 17th among the drivers in seniority and was the most senior driver of those who drove straight trucks out of the garage. Until mid-1976 Clark drove tractor-trailers; however, on June 8 of that year he transferred to the straight truck seniority list and thereafter drove straight trucks most of the time. Apparently, from the time that Clark began driving a straight truck he made occasional trips to Rockford, Illinois, which is about 90 miles northwest of Chicago via expressway. In 1978 or 1979 Respondent's business in Rockford increased and at that time Clark began making trips to Rockford daily.

There is no question that the Rockford run is a desirable assignment primarily because it necessitates a so-called "early start," or one at 6 a.m., and the driver normally returns between 5 and 7 p.m. Respondent's normal working hours are 8 a.m. to 4:30 p.m., with half an hour for lunch, so assignment to the Rockford run means substantial overtime for the driver. Since the most senior drivers had their choice of starting time, and as Clark was the most senior straight truckdriver, he was entitled to the Rockford run as long as a straight truck was utilized for that assignment.

Clark is a member of the Union and it is undisputed that he had actively sought to persuade Glen Wiszowaty, a driver employed by Grane Transportation Lines[7] who was not a member of Local 705, to join the Union. Clark credibly testified that he had had "a number of conversations" with Wiszowaty, and that he had told Wiszowaty that the Union was trying to organize the drivers of Grane Transportation Lines and that Wiszowaty should "hang in there." Wiszowaty credibly testified that Clark had tried to get him to join the Union ever since Wiszowaty had started working for Grane Transportation Lines, some 3-1/2 years prior to the instant hearing. Wiszowaty also credibly testified that on August 14, the day of the picketing, he was prevented from going through the picket line by about 30 of Respondent's drivers, and that a union business agent asked him to go talk to the Union's lawyers, which he did because, as he testified, "It was either that or get my head busted." However, Wiszowaty further testified that he did not see Clark on that occasion.[8] Wiszowaty also testified that following this incident he told Frank Bisceglie, Respondent's dispatcher, that Clark and the other drivers "were cornering me in the yard and wanted me to join the union," and that Bisceglie said that he would take care of the

[3] I take official notice that on August 28, 1981, subsequent to the close of the hearing herein, the Regional Director for Region 13 of the Board issued a Decision and Clarification of Bargaining Unit in Case 13-UC-135, in which he concluded, *inter alia*, that drivers for Grane Transportation Lines, Ltd., and Skilled Services Corporation should not be included in the bargaining unit comprised of Respondent's drivers and certain other employees. It appears that Case 13-UC-135 is currently pending before the Board; I have not used any of the Regional Director's findings or conclusions in that case in making any of my findings or conclusions in the instant case.

[4] This joint board is apparently the Joint Grievance Committee established pursuant to art. 19, sec. 2(b), of the contract as the forum for resolution of grievances.

[5] Art. 8, sec. 1(a).

[6] In his brief, counsel for the Union contends that, although evidence was adduced at the hearing that Respondent utilizes equipment seniority in assigning work, such a practice is not acknowledged by the Union to exist, and no findings regarding such a practice need to be made in this proceeding. However, the Union's argument in this regard ignores the relevance of this practice to issues in this case. Accordingly, I deem it appropriate to make findings regarding Respondent's practice in determining seniority; however, I make no finding as to whether this practice was or was not in accord with the collective-bargaining agreement.

[7] Wiszowaty initially testified that he was employed by Grane Transportation Lines, but then testified that as of August he was employed by Skilled Services Corporation, which "was the same thing." As discussed above, I make no findings as to the relationship among these various enterprises.

[8] Counsel for Respondent stated at the hearing that there is no contention that Clark was present at the picketing.

matter and for Wiszowaty not to worry about it. According to Wiszowaty, a couple of days later he talked to Michael Ryan, Respondent's terminal operations manager at that time, and, in response to Ryan's question as to how he was doing, told him that Clark and the other drivers were bothering him and trying to get him to join the Union. Ryan, like Bisceglie, told Wiszowaty not to worry and that he would take care of the problem.[9]

B. *The Threat to Clark on August 20*

Clark testified that on August 20 at or about 6 or 6:30 p.m., and after he had punched out for the day, he saw Wiszowaty come into the upstairs office,[10] and that he told Wiszowaty that he would like to speak with him after Wiszowaty finished his paperwork. According to Clark, he sat downstairs in the building to drink a cup of coffee, not wanting to go upstairs where the management offices were, and saw Bisceglie leave the building. After asking Clark why he was there, to which Clark responded that he was waiting for someone, Bisceglie walked to his car and left. Clark then went upstairs where he told Wiszowaty that he was going to testify at the Joint Grievance Committee hearing the next day and that "we were going to get this [apparently the Union's contentions about the relationship among the Grane enterprises] straightened out," and that Wiszowaty should "hang loose." According to Clark, at that point Bisceglie walked into the office, told Wiszowaty he would talk to him later, and left the office and walked downstairs. Clark followed him and Bisceglie said, as he was getting into his car, "I am going to tell you something, you were on vacation during this union business, but you know what is going on down here. . . . I want to tell you something, stay away from Glen, because the kid is scared, and he is going to get his head busted. If I catch you talking to him again, I am going to pull you off the Rockford run." Clark protested that Wiszowaty was his friend and he had "just been talking to him," but Bisceglie repeated his threat that if he caught Clark talking to Wiszowaty again Clark would be pulled off the Rockford run. Clark testified that he then told Bisceglie, "Well, you do what you want to do. Glen is a good friend of mine," and walked away.

Wiszowaty testified that on August 20 he had a conversation in the office with Clark in which the latter asked him if he wanted to join the Union, but that no one else was present. However, Bisceglie testified that he saw Clark and Wiszowaty talking in the office,[11] but that he did not hear what they said. According to Bisceglie, he had seen Clark outside the building and had told him to stop "harassing" Wiszowaty. Bisceglie then went into the building to get his things and go home, but when he came out again he saw that Clark had gone upstairs. Bisceglie followed Clark upstairs, saw that he was talking to Wiszowaty, and then Clark left, so Bisceglie left also. Bisceglie specifically denied that he told Clark that he would lose the Rockford run if he did not stop bothering Wiszowaty.

I credit Clark, and find that the incident occurred essentially as he described it. Clark seemed for the most part to be a straightforward and honest witness, and to testify to events to the best of his recollection. Wiszowaty also seemed to be a candid witness, but did not seem to remember details regarding the August 20 incident, which is understandable in view of the lapse of time between the event and his testimony. Bisceglie, on the other hand, although I credit his testimony on some matters, did not exhibit as favorable a demeanor as Clark, and, consequently, I have generally credited Clark over Bisceglie where there are conflicts between their testimony. Accordingly, I find that Bisceglie threatened Clark with loss of the Rockford run in reprisal for Clark's activity of trying to persuade Wiszowaty to join the Union.

Respondent contends that Clark's activities in attempting to cause Wiszowaty to join the Union fell outside the protection of Section 7 of the Act because they constituted harassment rather than protected persuasion. In support of this contention, Respondent relies on Wiszowaty's testimony that Clark and other drivers employed by Respondent "cornered" him about joining the Union, that some of the drivers called Wiszowaty a "scab," and that he went to see the Union's lawyers following the August 14 picketing because he was afraid of getting hurt if he did not. However, the record does not establish that Clark's conversations with Wiszowaty contained any threats or other statements which removed them from the protection of Section 7 of the Act; Wiszowaty explicitly testified that Clark had never threatened him and that he had never stated otherwise to any management official, and, although Wiszowaty stated that "they" called him a "scab," he did not testify that Clark was one of the drivers who did so.[12] Although Respondent cites numerous cases in its brief referring to unprotected activity, none of those cases involves activity such as that at issue here, and my research has failed to disclose any decisions in which the Board has found that repeated requests to join a union, in the absence of any real or implied threat, are not protected by Section 7 of the Act. Accordingly, I find that Clark's conduct in attempting to convince Wiszowaty to join the Union was protected concerted activity, and that by threatening Clark with reprisal for engaging in this activity Respondent violated Section 8(a)(1) of the Act.[13]

[9] Wiszowaty's testimony as to the dates of the conversations with Bisceglie and Ryan is unclear; he initially indicated that he first talked to Bisceglie "a few days" after the August 14 picketing, then that the conversation with Bisceglie was subsequent to a discussion with Clark, discussed below, which took place on August 20. Although Wiszowaty was generally a candid witness who appeared to testify to the best of his recollection, he did not appear to understand all the questions addressed to him with respect to dates, which may account for his somewhat confused testimony as to when various events occurred. In any event, it appears from the testimony of Bisceglie and Ryan, both of whom I credit in this instance, that their conversations with Wiszowaty occurred prior to the August 20 conversation between Wiszowaty and Clark, and I so find.

[10] It appears, although it is not clear, that Grane Trucking Company and Grane Transportation Lines use the same facility.

[11] Bisceglie did not specify the date of the incident, but it appears from his testimony as a whole that it was around August 20.

[12] In any event, it is well established that an employee's use of the word "scab" is not, by itself, outside the limits of protected activity. *Bandag, Incorporated*, 225 NLRB 72, 84 (1976).

[13] The General Counsel in his brief contends that Bisceglie, by testifying that he instructed Clark to stop "harassing" Wiszowaty, admitted

Continued

C. *The Removal of Clark From the Rockford Run*

As noted above, the dispute between Respondent and the Union over the relationship between Respondent and certain other firms was heard by the Joint Grievance Committee on Thursday, August 21, and Monday, August 25. Clark testified on August 21, along with five other drivers, as a union witness, and was also present at the hearing on August 25, missing work on both days in order to attend the hearing. On August 22,[14] Clark testified, he returned from his usual run to Rockford, punched out, and told Bisceglie that he would not be in on Monday, to which Bisceglie responded that he knew Clark would be at the hearing. Clark then left the office with Bisceglie following. Bisceglie, according to Clark, told Clark to take his things out of truck 548, the one Clark normally drove to Rockford, because that truck was going to be leased to a firm called Leaf Brands, and would therefore no longer be available for Clark's use.

On Monday, August 25, Clark did not receive his customary evening telephone call from Respondent,[15] so he called Ken Burnett, Respondent's night router, and asked about the stops for the next day. According to Clark, Burnett told him that "I have been told that you no longer have the Rockford run and that you have an 8:00 o'clock start from now on." Clark said that he could not say anything about the situation to Burnett and that Burnett could not say anything to him, and the conversation ended. Clark was not thereafter assigned the Rockford run and has not received as much overtime work since August 25 as he had received prior to that date. Clark credibly testified that truck 548 was not leased but sat on the lot for the rest of that week. It is undisputed that since August 25 a tractor-trailer has been used for the Rockford run, and that Ben Indurante, Respondent's senior driver both on the tractor-trailer list and overall, has regularly taken the run.

The General Counsel contends that Respondent removed Clark from the Rockford run in reprisal for his attempts to persuade Wiszowaty to join the Union and because he testified at the Joint Grievance Committee hearing.[16] Respondent, however, contends that Clark lost the assignment because business considerations prompted a decision to use a tractor-trailer rather than a straight truck for that route, and that Clark was not entitled to switch to other equipment in order to keep the run.

1. The General Counsel's evidence

In support of his contention, the General Counsel relies on the August 20 threat which I have found above violated Section 8(a)(1) of the Act, the timing of Respondent's reassignment of the Rockford run the day after Clark's second appearance at the Joint Grievance Committee hearing and 6 days after the threat, and the testimony of Michael Ryan, Respondent's terminal operations manager as of August.[17]

Ryan testified that, subsequent to his conversations with Bisceglie and Wiszowaty about Clark's efforts to persuade Wiszowaty to join the Union, on August 22 or 25 Bisceglie came to Ryan's office and told Ryan that he wanted to take Clark off the Rockford run because of Clark's "harassment" of Wiszowaty and Clark's union activities. According to Ryan, he told Bisceglie that he had no objection to assigning Indurante to that run instead of Clark. Ryan further testified that after his discussion with Bisceglie he talked to Hubert Grane, Jr., the president of Grane Leasing Corporation[18] and Grane Transportation, Limited, and told him that Clark was going to be removed from the Rockford run because he

having committed a violation of Sec. 8(a)(1) of the Act, and requests that I so find. Clark did not testify that Bisceglie used the term "harass," but that Bisceglie did instruct him "to stay away from Glen." I construe Bisceglie's instruction, under either his or Clark's version of this portion of the incident, to be a component of the threat which I have found based on Clark's testimony. In other words, having found that Bisceglie threatened to take Clark off the Rockford run unless he ceased his communications about the Union with Wiszowaty, I further find that Bisceglie's instructions to cease such contacts, whether phrased as an order to stop "harassing" Wiszowaty or to "stay away from" him, were a part of the threat rather than a separate statement on which to base a finding of an unfair labor practice. Accordingly, I do not make the finding requested by the General Counsel.

[14] Clark testified that the date was "August 21," but that it was the "day after the hearing." The date in question is clearly, from the record as a whole, August 22, and I so find.

[15] Clark credibly testified that he either called in or received a call from the night router each evening so that he could route the bills for the Rockford stops the next day, inasmuch as he knew the layout of the streets in Rockford.

[16] In its brief Respondent contends that the allegation of discriminatory treatment is based solely on Clark's attempts to cause Wiszowaty to join the Union on the basis of the following exchange at the hearing before me:

> Q. [On cross-examination of Clark by counsel for Respondent] Were you aware at the time of any charge that was filed by anyone before the National Labor Relations Board that was pending at the time you gave testimony before the eight-man board.
>
> MR. POURITCH: I will object to this.
>
> MR. MATHEWS: I am going to object, too, because *there is no allegation that Mel Clark was discriminated against because he testified at the eight-man board.*
>
> MR. HENNESSY: All right, fine, or that he gave a statement to the National Labor Relations Board?
>
> MR. POURITCH: There's no allegation.
>
> MR. HENNESSY: O.K., fine, in that case, I have no reason to pursue that.
>
> JUDGE BENARD: All right, so the General Counsel is specifically disclaiming any 8(a)(4) allegation in this case?
>
> MR. POURITCH: Yes. [Emphasis supplied.]

Respondent contends that the foregoing constitutes a disclaimer of any allegations of unlawful treatment based on Clark's testimony before the eight-man board. I disagree. On the record as a whole it appears that counsel for the Union's reference to the "eight-man board" was inadvertent, and that counsel intended to refer to the National Labor Relations Board, an inference especially warranted in light of the fact that the discussion of which the above-quoted exchange was a part centered around the question of whether there was any issue in this case of a violation of Sec. 8(a)(4) of the Act. In addition, the record and the General Counsel's brief make it abundantly clear that the General Counsel adhered to the allegation in the complaint to the effect that Respondent took reprisals against Clark because of his testimony before the Joint Grievance Committee, and the Union's brief adopts the General Counsel's brief in all respects save that discussed above at fn. 6. Finally, even if counsel for the Union had intended to stipulate that Clark's testimony before the Joint Grievance Committee was not a basis for the alleged discrimination against him, such a theory of the case advanced by the Charging Party is not binding on the General Counsel in any event. Accordingly, I find that the question of whether Respondent removed Clark from the Rockford run because of his testimony at the Joint Grievance Committee hearing is properly before me.

[17] The General Counsel further contends, of course, that Respondent's asserted defenses are without merit, a matter to be considered below.

[18] Apparently another enterprise owned and/or managed by members of the Grane family.

had been "harassing" Wiszowaty and had been "involved in the union thing," and that Grane replied, "That is fine. It will hurt him in his pocketbook. That will teach him something to keep his mouth shut the next time."

Ryan also testified that about a month before these events a firm called Leaf Brands had ordered a diesel straight truck from Grane Leasing Corporation[19] but, because Grane had only gas straight trucks available, that was the type of equipment furnished to Leaf Brands. Leaf Brands complained about the substitution, so there had been a plan to take the diesel straight truck used by Clark for the Rockford run and to give it to Leaf Brands. Ryan further testified, however, that for reasons unknown to him that plan, which was in any event to be a temporary measure until Grane Leasing Corporation acquired a new diesel straight truck to furnish to Leaf Brands, was never implemented.

Finally, Ryan testified that no reprisals were taken against the five other drivers who testified on behalf of the Union at the Joint Grievance Committee hearing because, given the way Respondent had established its seniority system and Clark's place on the roster, it was fairly easy to remove him from the Rockford run simply by changing equipment and assigning the run to Indurante, but "it would be more trouble than it is worth" to assign the other five drivers to undesirable runs.

The witnesses at the instant hearing were not sequestered, and Bisceglie, who testified after Ryan, stated, in response to questions as to when and why the decision was made to use a tractor-trailer instead of a straight truck on the Rockford run, that the decision was made in late August or the beginning of September by Ryan and himself because of business considerations. Bisceglie was not asked whether he had ever suggested to Ryan that Clark be removed from the Rockford run because of either his encounters with Wiszowaty or his involvement in the Joint Grievance Committee hearing.

Hubert Grane, Jr., specifically denied that he had any conversations with either Bisceglie or Ryan in August concerning Clark, and testified that he did not know anything about the decision to remove Clark from the Rockford run.

Clearly, a substantial issue in the case revolves around Ryan's credibility. As noted above, Ryan was Respondent's terminal operations manager in August. However, in October Ryan was discharged by Respondent. Ryan testified that the reasons for his discharge were never supplied to him, that he never received his final paycheck from Respondent, and that consequently he filed a claim for compensation before the Illinois Department of Labor which was still pending at the time of the instant hearing. Ryan responded in the negative when asked on cross-examination by counsel for Respondent whether Respondent's defense in the compensation proceeding was that Ryan had attempted to solicit employees and customers of Respondent to leave that Company. Ryan further testified that after he left Respondent he formed another trucking company which is to some extent a competitor of Respondent, but denied that he had solicited Respondent's employees to work for him or had solicited Respondent's customers to become his accounts.

However, Bisceglie credibly testified that in August and September Ryan told him that he was planning to leave Respondent and asked Bisceglie to join him, and Ken Burnett testified that Ryan told him that he was starting a new company and would consider him for employment.

On this issue, I credit Bisceglie and Burnett, and find that Ryan was soliciting Grane employees to go to work for him, contrary to Ryan's testimony. I further find that Ryan harbored considerable hostility toward Respondent at the time of the hearing, and that this animus must be considered in assessing his credibility. However, I am convinced that, although Ryan did not impress me as a witness with any particular concern for the importance of veracity, his testimony about the conversation with Bisceglie about reassigning Clark and the reasons for doing so and his subsequent conversation with Grane was accurate. This testimony, as well as Ryan's testimony about the reasons that no reprisals were taken against any of the other drivers who testified at the Joint Grievance Committee hearing, had the ring of truth, and he testified in a straightforward manner regarding these events in contrast to his evasive testimony concerning the termination of his own employment with Respondent.[20] Accordingly, I credit Ryan's testimony that Bisceglie asked his agreement to take Clark off the Rockford run because of his protected concerted activities, and discredit Bisceglie and Grane to the extent that their testimony is inconsistent with that of Ryan.[21]

2. Applicable principles

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board discussed at some length the issues posed by what it termed "pretext" and "dual motive" cases; i.e., cases in which the General Counsel contends that the asserted legitimate reason advanced by an employer for its allegedly discriminatory action is either completely false, or that, in any event, part of the reason for the action was the employee's union or other protected concerted activity and thus the action is unlawful. In the latter, dual-motive case, the employer has two reasons for its action against an employee, one based on legitimate considerations and the other based on the employee's protected activity. In *Wright Line, supra*, the Board concluded that in these circumstances the following test is to be used:

[19] According to Ryan, Grane Leasing Corporation leased only equipment, not drivers.

[20] The statement bears repetition here that "nothing is more common in all kinds of judicial decisions then to believe some and not all," of a witness' testimony. *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950).

[21] I note, and credit, Bisceglie's testimony that, in a meeting with a Board agent after the instant charge was filed and before Ryan left Respondent's employ, Ryan said that the main reason Clark was taken off the Rockford run was financial. I do not view it as unlikely that Ryan would make a statement to the Board while he was employed by Respondent that is at odds with his testimony following his discharge, and, as discussed above, I conclude that Ryan's testimony at the instant hearing is of more probative value on this issue than his prior statements.

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to establish that the same action would have taken place even in the absence of protected conduct. [251 NLRB at 1089]

In the instant case, having found that Bisceglie threatened Clark on August 20 that Clark would be removed from the Rockford run if he continued his activity of attempting to persuade Wiszowaty to join the Union, that Bisceglie suggested to Ryan that Clark be removed from the Rockford run because of his union activity, and that Clark was in fact removed from that route on August 25 after he testified against Respondent at the Joint Grievance Committee hearing, I conclude that the General Counsel has established his *prima facie* case and has shown that Clark's protected concerted activity was a "motivating factor" in Respondent's decision to remove him from the Rockford run. Accordingly, it is appropriate at this point to examine Respondent's defense.

3. Respondent's economic defense

It is undisputed that Clark was only entitled to assignment to the Rockford run so long as a straight truck was used for that route. Respondent contends that its decision to cease using a straight truck and to utilize a tractor-trailer instead for the trips to the Rockford area was motivated by business considerations. Specifically, Respondent asserts, *inter alia*, that (1) due to increased business in the Rockford area Respondent desired to have the larger capacity of a tractor-trailer available for that route,[22] and (2) using a tractor-trailer provided the opportunity, if there were no freight for the return trip to Chicago, to drop off the empty trailer on the way back.[23]

In support of these contentions, Bisceglie testified, as noted above, that he and Ryan decided to make the change in equipment for the Rockford run at the end of August or in early September because they were of the view that if the Rockford business continued as it had been going they would need a tractor-trailer to haul the freight in both directions and because of the availability of an empty trailer for "drops." Bisceglie further testified that shortly after Respondent started making pickups in Rockford for Gates Rubber Company in mid-1979 there were discussions about using a tractor-trailer in the Rockford area if business continued to increase. It is undisputed that the amount of freight to be picked up at Gates was unpredictable and that the freight was bulky. According to Bisceglie, on a few occasions prior to August there were calls from Gates because Clark was unable to pick up all their freight and some of it had to be left in Rockford. It is also undisputed that about three times prior to August Clark had used a tractor-trailer for the Rockford run because there was too much freight for the straight truck.[24]

The record establishes, and I find, that there had been discussions about changing to a tractor-trailer on the Rockford run, and that Clark had attempted to receive waivers of their seniority rights from the tractor-trailer drivers senior to him.[25] However, the only specific evidence about such discussions prior to the change was provided by Bisceglie and Vernon Shimanek, the straight truck driver bumped by Clark when the latter originally received the Rockford run.[26] Shimanek testified that there were conversations shortly after Respondent acquired Gates as a customer about the possibility of switching to a tractor-trailer if the freight got much heavier, and that these discussions occurred in 1978 or 1979. Bisceglie also testified that around the middle of 1979, right after Gates became a regular account, there were conversations about changing the equipment on that run because of the unpredictability of Gates' load. However, there is no evidence of subsequent discussions of the matter prior to the conversation in which Bisceglie requested Ryan to remove Clark from the Rockford route. Accordingly, I conclude that Respondent's evidence as to discussions about using a tractor-trailer to go to Rockford provide little support for its contention that the decision to change equipment in August was premised on business considerations.

Respondent also adduced documentary evidence in the form of drivers' trip sheets showing which drivers and

[22] It is undisputed that the amount of freight to be picked up in Rockford for the return trip to Chicago was unpredictable, and that the driver did not generally know, when he left Respondent's terminal in the morning, how much freight he would have for the return trip.

[23] Respondent has two customers in Elk Grove Village, a suburb of Chicago located near the expressway to Rockford, who load trailers themselves; Respondent drops off an empty trailer and picks it up after it has been loaded by the customer at its convenience. Apparently, prior to July Respondent delivered goods for a Zayres store and used the empty returning trailers for these "drops." However, Respondent lost the Zayres account in July.

[24] Clark testified that he received permission from Bisceglie to use the tractor-trailer on these occasions. Bisceglie corroborated this testimony, but further stated that "there was a lot of repercussions from Mike [Ryan] and the other drivers . . . [because you] can't take one driver from a straight truck and put them on a tractor and trailer one day and, you know, back and forth, especially on an early start."

Ryan testified that he did not know that Clark had used a tractor-trailer to go to Rockford until afterwards, but when he found out about it he put a stop to the practice. Ryan further testified that no grievances were filed about the matter by other drivers. I credit all three witnesses to the extent that their testimony on this issue is consistent. However, inasmuch as there was no evidence that grievances had been filed on this subject, and as the only tractor-trailer driver to testify, Indurante, was not asked about Clark's use of tractor-trailers on trips to Rockford, I do not credit Bisceglie's testimony that there were "reprisals" from other drivers over such use, and consider this testimony an example of his tendency to sometimes shade his testimony in Respondent's favor.

[25] Clark testified that the three drivers ahead of him on the tractor-trailer list agreed that they would not "time slip or bump the company if I wanted to go with a tractor-trailer with the Rockford run only." Indurante testified that he had refused to sign a waiver proffered to him by Clark. However, it is not clear to what extent the testimony of the two witnesses is inconsistent because Clark had apparently attempted to obtain waivers over a period of time extending from well before August 25 to shortly before the instant hearing. Clark's testimony suggests that he had obtained the waivers at the time he used a tractor-trailer to go to Rockford in June and July, and Indurante's testimony suggests that he refused to sign such a waiver about 3 weeks before the hearing, but both witnesses' testimony is too vague to permit a finding on this issue. The other two drivers ahead of Clark did not testify, and thus Clark's testimony that he obtained waivers from them is uncontradicted, and I credit it.

[26] Bisceglie also testified about discussions of consolidation of freight. However, he did not testify that the Rockford route or the equipment to be used on it was a subject of these discussions.

equipment went to Rockford, the deliveries and pickups they made, and the weight of each shipment. Examination of these documents[27] establishes that, during the period July 31, 1979, through August 25, 1980, Indurante made the trip to Rockford 43 times and drivers other than Indurante or Clark made the trip 13 times. In its brief, Respondent asserts, on the basis of the trip sheets, "The record demonstrates that on at least sixty eight occasions in a thirteen month period between July, 1979 and August 25, 1980, Clark's straight job was found to be inadequate or unfit to properly perform the work necessary on the Rockford area run." I disagree. First, although Respondent's Exhibit 8, consisting of 24 trip sheets for the Rockford run, was proffered as covering the July 1979 through August 25, 1980, period, in fact, and apparently through inadvertance, the exhibit includes only 13 trip sheets for that period;[28] the remaining 11 trip sheets in the exhibit are dated between October 27, 1980, and May 29, 1981. Second, it is undisputed that, generally when Clark was on vacation or otherwise unavailable to make the trip to Rockford, Indurante substituted for him, and that Clark was on vacation from August 4 through August 15. I thus conclude that at least some of the runs Indurante made during that period were assigned to him solely because Clark was not at work, and not because his truck was incapable of handling the load. Similarly, I note that Indurante also took the Rockford run for two consecutive weeks from July 30 to August 10, 1979, and infer that Clark was not at work during that period also, and that some of the assignments to Indurante were made for that reason, and not because of a need for a tractor-trailer. Third, and most importantly, the trip sheets show the weight of the freight, but not the type of freight or its dimensions. Thus, while it is clear from the trip sheets that between July 30, 1979, and August 25, 1980, there were at least 17 loads that were over 15,000 pounds[29] and thus could not have been carried on a straight truck,[30] the trip sheets do not indicate whether a tractor-trailer was also required on other trips because the freight was too bulky to be carried on a straight truck.

Respondent argues, correctly, that "the National Labor Relations Act does not restrict the right of the employer to determine its own business operations." This argument, however, misses the point. It is not for me to decide whether Respondent had a valid reason for deciding to use different equipment on the Rockford run. What is for me to decide is whether, had Clark not engaged in protected concerted activity, Respondent would have nonetheless made that decision. Inasmuch as I have found that the General Counsel has established his *prima facie* case, and that the burden of producing evidence to rebut that case shifts to Respondent, I further find that Respondent had not met that burden. The evidence does establish that there were times when a straight truck was incapable of handling the loads for the Rockford run. However, Respondent did not adduce probative evidence that these times had become more frequent during any given period prior to August 25, or that there was any specific factor prompting the decision to change equipment other than Clark's protected concerted activity.[31]

Further, it cannot be gainsaid that Respondent is in control of evidence which would support its position. Although Respondent adduced testimony from Indurante to the effect that the nature and dimensions of the freight, rather than merely its weight, are factors in determining whether a straight truck can haul it, Indurante's testimony did nothing to establish that loads which could not be carried on a straight truck had become more frequent within any given period prior to August 25.[32]

Further, Bisceglie credibly testified that Respondent's rates depend not only on the weight of the freight, but also on its type. Thus, it would seem that Respondent has some record of the type of freight it hauls; however, although Respondent emphasized that the type of freight may determine whether it will fit into a straight truck, it adduced no evidence whatsoever that on any specific trip the type of freight carried necessitated use of a tractor-trailer.

In light of all the foregoing, I conclude that a preponderance of the evidence supports the General Counsel's contention that Clark would not have been removed from the Rockford run absent his protected concerted activity.[33] In reaching this conclusion, I rely on my finding that Bisceglie asked Ryan to remove Clark from the Rockford run because of his protected concerted activity, the timing of the decision to change the equipment, the lack of probative evidence of any reason for this specific timing except Clark's activity, and Bisceglie's threat

[27] Resp. Exh. 7 consists of trip sheets for runs made by Indurante; Resp. Exh. 8 consists of trip sheets for runs made by drivers other than Clark or Indurante. No trip sheets of runs made by Clark are in evidence.

[28] In addition, one of these 13 runs, that of April 29, was made in a straight truck, but not by Clark.

[29] The trip sheets also establish that on three occasions during this period an empty trailer was dropped off on the way back to Chicago, which could not have been done had a straight truck been used on the route that day.

[30] On 10 of these 17 occasions a substantial part of the load, without which the total would have been less than 15,000 pounds, was accounted for by freight from Union Carbide, a customer which Respondent apparently lost well before August 25. (Bisceglie testified that this account was lost "in the last two years," and the latest reference to Union Carbide in the trip sheets is January 22.)

[31] Respondent contends that the timing of the decision to change equipment was based on a comparison of the efficiency of Clark and Indurante, and that the comparison was not made until the week ending August 22. However, the record contains no documents reflecting this alleged comparison, the testimony about it is vague, and, while it is undisputed that Indurante does at least as well on that job as Clark, there is no evidence that Clark's performance was anything less than satisfactory. In making this finding I am cognizant of Ryan's testimony that he would tell Clark, as he did other drivers, that "you are moving too slow." However, it also appears that this was a complaint directed by management to all the drivers, and I do not give it significant weight, particularly as Respondent presumably maintains records of Clark's performance but did not produce them.

[32] There are no trip sheets in evidence for the period May 30 through August 1 and, as noted above, no trip sheets in evidence reflecting runs made by Clark. Although it is possible that there were runs to Rockford which are not reflected by the trip sheets, it is Respondent's burden to adduce evidence of them. Accordingly, I infer that the only driver to make the Rockford run during that period was Clark, and that, other than the three runs which he testified he made in a tractor-trailer, he used a straight truck on this route.

[33] It is therefore unnecessary to determine whether Respondent's asserted reason for changing the equipment was wholly pretextual.

to have Clark removed from the Rockford run. Accordingly, I conclude that Respondent changed the equipment to be used on the Rockford run in order to reassign that route away from Clark, and that Respondent thus deprived Clark of overtime opportunities in reprisal for his union and other protected concerted activities, thereby violating Section 8(a)(1) and (3) of the Act.

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Grane Trucking Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employee Melvin Clark with a change in working conditions and consequent loss of overtime pay because of his union and/or other protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

4. By changing Clark's working conditions and thereby causing him a loss of overtime compensation because of his union activities and/or other protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully removed Melvin Clark from the Rockford run, I shall recommend that it be ordered to offer him reassignment to that route or, if it no longer exists, to a substantially equivalent route, without prejudice to his seniority or other rights and privileges previously enjoyed. I shall further recommend that Respondent be ordered to make Clark whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of the reassignment of the Rockford run until the date of Respondent's offer to reinstate him to that route, less net earnings, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), to which shall be added interest, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[34]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[35]

The Respondent, Grane Trucking Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with changes in their working conditions and consequent loss of overtime pay because of their union and/or other protected concerted activities.

(b) Changing employees' working conditions, thereby causing them to lose overtime compensation, or otherwise discriminating against employees in regard to hire or tenure of employment, because of their union and/or other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Melvin Clark immediate and full reassignment to the Rockford route or, if that route no longer exists, to a substantially equivalent assignment, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of Respondent's discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Chicago, Illinois, facility copies of the attached notice marked "Appendix."[36] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[34] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[35] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[36] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten employees with changes in their working conditions and consequent loss of overtime compensation because of their union and/or other protected concerted activities.

WE WILL NOT change employees' working conditions and cause them loss of overtime compensation, or otherwise discriminate against employees in regard to hire or tenure of employment, because of their union and/or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act to engage in self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer Melvin Clark immediate and full reassignment to the Rockford route or, if that route no longer exists, to a substantially equivalent assignment, without prejudice to his seniortiy or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have sufffered as a result of our discrimination against him, with interest.

GRANE TRUCKING COMPANY